shall private property be taken for public use, without just compensation."

Local Law No. 2 of the Town of Woodbury for the year 1989 provides in relevant part the following condition for final plat approval:

> Payment by cashier's check or certified check drawn to the order of the town in the sum of one thousand five hundred dollars ($1,500) per lot for each lot in the subdivision, in lieu of providing parkland within the subdivision, if the [Planning] Board approves the acceptance of such payment in lieu of parkland . . .

STATEMENT OF THE CASE

In 1999 the Petitioner ("Long Clove") paid the Respondent (the "Town") an "in lieu of" parkland fee of $1,500.00 per lot ($132,000.00) which was imposed under local law as a condition for the issuance of building permits in its 82 lot subdivision. The fee was in lieu of the dedication of actual parkland in the Subdivision. The Town's planning board, in the plan review process, had determined

that such a fee, under the given circumstances, was more appropriate than the dedication of parkland.[1]

Long Clove paid the fee under protest, claiming that there was more than ample park and recreational land extant in the Town to accommodate the recreational impacts generated by the Subdivision. It argued that: (i) there was no basis for any additional facilities and, thus, no basis for the "in lieu of" fee to begin with and, (ii) the fee was wholly disproportionate to the recreational impacts generated by the Subdivision.

In December of 1999 Long Clove commenced this action under 42 USC §1983 in the Supreme Court of the State of New York. Relying on *Dolan* it alleged that as applied to it under the circumstances at hand the 1989 local law resulted in the wrongful taking of its property, its money.

The Town of Woodbury is situated in the Hudson Highlands adjacent to the United States Military Academy at West Point. Within its bounds are over ten thousand acres of active and passive recreational facilities made up of a regional state park, several

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[1] This two step process is authorized in New York by NY Town Law (McKinney's) Section 277[4](c). The Town's uniform per lot "in lieu of" fee is contained in Local Law No. 2 of 1989 set out above.

thousand acres of West Point lands available by special permit, the campus of the regional high school serving the area, and four "town parks" owned and maintained by the Town for its residents. There is also a private 18 hole golf course in the Town. The public facilities are improved with multiple indoor and outdoor swimming facilities, all manor of playing fields and play areas, indoor and outdoor basketball courts, hiking trails, camping and boating areas, a ski facility, and several thousand acres of scenic vistas overlooking eight lakes. All of these facilities are available to the occupants of the Subdivision. These basic facts are not in dispute and were stipulated to.

The case was tried without a jury. Long Clove's expert testified that the vast array of recreational facilities in the Town could more than absorb any recreational impacts generated by the Subdivision. On the other hand, the Town's expert relied on a recreational needs study the Town had commissioned in 1999 focusing only on the four Town owned parks. That study concluded that by reason of population trends there was a need to enhance these four town parks and, as well, to build a new 20,000 square foot "community center" with, among other things, indoor swimming and ball court facilities at a cost of 5.7 million dollars. The study recommended the continued use of "in lieu of parkland" fees imposed upon developers to fund this need.

The trial court concluded that the Town had met its burden under *Dolan* by virtue of the 1999 study. It dismissed Long Clove's complaint and rejected its proportionality argument reasoning that the Town's desire to enhance its own "neighborhood parks" available only to Town citizens rather than relying on "regional" facilities open to the general public was legitimate and did not render the Town's fee calculations an unconstitutional taking of Long Clove's money.

The New York Appellate Division affirmed the trial court citing *Dolan*. An appeal to the New York Court of Appeals taken as of right was dismissed *sua sponte* upon a finding that the appeal did not involve a substantial constitutional question.

REASONS FOR GRANTING THE WRIT

1. IT IS ESSENTIAL THAT THE COURT RESOLVE THE GROWING DISORDER THAT HAS FOLLOWED *DOLAN*

"*The fat lady has sung: development impact fees are here to stay.*"[2]

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[2] Arthur C. Nelson, "Development Impact Fees: The Next Generation", in Exactions, Impact Fees and Dedications, Freilich and Bushek ed., American Bar Association (continued...)

In recent years numerous local governments across this nation, working within an anti tax atmosphere, have relied heavily on impact and in lieu of fees as an important new revenue tool used to meet recreational and other needs occasioned by growth. Such charges have become not only routine but quite substantial.[3] These fees are imposed only upon the developer and, therefore, are painless to the existing and voting taxpayers. Yet, they do affect the landowner, the developer, the housing community and even the non-voting future homeowner. They all

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[2] (...continued)
Publications, 1995. A recent government study found that 60 percent of cities with more than 25,000 residents impose impact fees to fund infrastructure needed to serve new housing development. General Accounting Office, *Local Growth Issues-Federal Opportunities and Challenges*, Government Printing Office, 2000.

[3] A recent study has found that in California, where impact fees are most prevalent, they average $19, 552.00 per housing unit. See Landis, et. al., *Pay to Play: Residential Development Fees in California Cities and Counties,* State of California Department of Housing and Community Development (2001). These fees can range into the millions of dollars for a single project. In one early post-*Dolan* case the 1st Circuit voided a $1,792,960.00 in lieu of fee relying, at least in part, on *Dolan.* See *City of Portsmouth New Hampshire v. Schlesinger,* 57 F.3d 12, 17-18 (1st Cir., 1995).

share in some real way in the burden of this new funding paradigm.[4]

Because of the breadth and scope of "in lieu of" and other types of impact fees throughout this nation the question of whether they are subject to *Dolan's* heightened scrutiny analysis looms large. If they are the burden of justifying them in the first instance falls squarely on the shoulders of the government imposing them. If they are not they become a mere obligation to pay money imposed by the law-making body which many, including Justice Kennedy of this Court, have argued is not the stuff of the takings clause. When viewed in that light these fees become endowed with a strong presumption of legitimacy relieving the government from the primary burden of justification.

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[4] There have been many studies about the "impact of impact fees". They are summarized by professor Been in *Impact Fees and Housing Affordability,* 8 Cityscape, (an HUD publication) at 139 (2005). What emerges from the studies is that the burden of these fees has a real impact on-all facets of the housing stream from the seller of raw land on one end of the spectrum to the ultimate consumer of a home at the other, and that the imposition of these fees can, if abused, act to impede access to needed new housing stock and exploit new non-voting homeowners.

Which way is it? There is confusion across this land on this important issue. This Court must resolve that confusion. Over a decade ago in *Dolan* this Court opened the door to a whole new way of looking at these types of compelled donations of land and money. The Court now needs to explain just how far that door is open.

It seems logical and apparent that an "in lieu of parkland" fee is no different from exacting a dedication of land. Accordingly, *Dolan* should control the issue. As such, because this Town deliberately excluded adequate and available parkland in its impact and resulting fee calculations, it would seem just as logical and apparent that the fee should be viewed as failing *Dolan's* rough proportionality requirements and be stricken as an unjustified taking of property, Long Clove's money, by the Town.

Yet, the nationwide confusion surrounding the reach of *Dolan* is profound. Very little about its reach is certain as evidenced by the numerous state high court decisions construing it one way in one state and just the opposite in another. Even the decisions in the federal courts do not seem consistent.

The post *Dolan* disorder plays out along two well defined fault lines. First, does *Dolan* apply to legislatively compelled development conditions, be

they either exactions of money or dedications of land, or is it confined to *ad hoc* "adjudicatory" conditions imposed administratively resulting from the land use review process? Second, does *Dolan* apply to monetary exactions, i.e., "fees", or is it limited to the compelled dedications of actual land?

As a corollary to these much debated areas of uncertainty there is another equally important question that remains unanswered and confused. Is an "in lieu of parkland" fee tantamount to a compelled dedication of the land in lieu of which the fee is paid thereby placing it squarely within *Dolan's* ambit or is it just another monetary "development fee"?

A. Does *Dolan's* Heightened Scrutiny Apply to Fees Imposed by Legislation or Only to Those Imposed by Administrative or "Adjudicatory" Action?

i. States Holding That Legislatively Set Fees Are Not Subject to *Dolan's* Heightened Scrutiny Analysis

Some state high courts have held that development fees imposed by general legislation rather than by administrative action are not bound by *Dolan*. These courts view such legislation as not "adjudicatory" in the sense meant by *Dolan* and employ a deferential approach to the fee legislation.

The states of Oregon (*Rogers Machinery, Inc. v. Washington County*, 181 Or. App. 369, 387-388, 45 P.3d 966, 976 (2002)), Arizona (*Home Builders Association of Central Arizona v. City of Scottsdale,* 187 Ariz. 479, 486, 930 A.2d 993, 999-1000 (1997)), Maryland (*Waters Landing Limited Partnership v. Montgomery County,* 337 MD 15, 40, 650 A.2d 712, 724 (1994), and Georgia (*Parking Association of Georgia, Inc. v. City of Atlanta,* 264 Ga. 764, 766, 450 S.E.2d 200, 203 (1994), cert. denied 515 U.S. 1116 (1995)), adhere to this view.

ii. States Holding That Legislatively Set Fees Are Subject to *Dolan's* Heightened Scrutiny Analysis

Other states have held just the opposite. The states of Washington (*Trimen Development Company v. King County,* 124 Wash.2d 261, 274, 877 P.2d 187, 194 (1994)), Texas (*Town of Flower Mound v. Stafford Estates Limited Partnership,* 135 S.W.3d 620, 635-641 (TX, 2004)) and New York (*Twin Lakes Development Corp. v. Town of Monroe,* 1 N.Y.3d 98, 103-106, 801 N.E.2d 821 (2003), cert. denied 541 U.S. 974 (2004) and *Smith v. Town of Mendon,* 4 N.Y.3d 1, 12, 822 N.E. 2d 1214, 1219 (2004)) adhere to the view that *Dolan's* heightened scrutiny test does apply to legislatively imposed monetary obligations. The court in *Flower Mound,* after reviewing this dichotomy, emphatically rejected the legislative-adjudicatory distinction.

Even members of this Court do not seem to be in agreement on this issue. See *Parking Association of Georgia v. City of Atlanta,* 515 U.S. 1116 (1995), Thomas J. dissenting from denial of certiorari joined by Justice O'Connor.[5]

B. Does the Compelled Payment of Money Fall Under *Dolan's* Heightened Scrutiny Test?

i. States Holding that Exactions of Money Are Not Subject to *Dolan's* Heightened Scrutiny Analysis

On this question the division between the high courts appears even deeper. Some have held that the compelled payment of money under any motif does not fall within *Dolan's* purview. These courts hold that *Dolan's* taking analysis attaches only to

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[5] The situation at the lower courts across the nation on this issue is equally confused - perhaps more so. See Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard,* Note, 75 N.Y.U. L. Rev. 242 (2000) in which the author surveyed numerous lower court cases interpreting *Dolan* and found that there is "considerable disagreement" and "much confusion" in those lower courts about the legislative-administrative distinction. Emblematic of this confusion is the holding of *Amoco Oil Co. v. Village of Schaumburg,* 277 Ill. App. 3d 926, 941-952, 661 N.E.2d 380, 390 (Ill. App. Ct., 1995) in which an intermediate Illinois appellate court followed the dissent of Justice Thomas in *City of Atlanta* finding his reasoning "particularly persuasive".

compelled dedications of land. Arizona has adopted this view (*Home Builders Assn. v. City of Scottsdale,* supra at 187 Ariz. 479, 930 P.2d 999-1000 (1997). So too has Colorado (*Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 695-696 (CO, 2001)), Kansas (*McCarthy v. City of Leawood,* 257 Kan. 566, 580, 894 P.2d 836, 835 (1995)) and South Carolina, in dicta, (*Sea Cabins on the Ocean IV Homeowners Association Inc. v. City of North Myrtle Beach,* 345 S.C. 418,433 FN5, 548 S.E.2d 595, 603-604 (2001)).

In *County of Monterey v. Del Monte Dunes at Monterey, LTD,* 526 U.S. 687, 702-703 (1999) the Court declined to apply *Dolan's* rough proportionality requirements to the denial of a development permit observing that to do so would be cumbersome and that it had not extended *Dolan's* reach beyond its own special context, the compelled dedication of land to public use as a condition for the issuance of a development permit. Many consider this holding as limiting *Dolan's* reach to the dedication of land only and not to the payment of money.[6] Yet, the Court gave no indication whether

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[6] In the courts below the Town, relying on *Del Monte Dunes,* made this argument. Long Clove recognizes that if this Court grants the Petition it might ultimately agree with the Town and affirm on that basis. However, whether this

(continued...)

a compelled payment of a sum of money to the public fisc in lieu of a compelled dedication of property to public use should be treated any differently.

High courts commenting on *Del Mone Dunes* seem conflicted about its import. In 2001 in *Sea Cabins* (at 345 S.C. 433 FN 5, 548 S.E.2d 603) the South Carolina Supreme Court was emphatic that after *Del Monte Dunes*, *Dolan* applied "only" to land dedications. In 2003 the Oregon Court of Appeals in *Dudek v. Umatilla County*, 187 Or. App. 504, 516 FN 10 (2003) was not so sure suggesting that after *Del Monte Dunes, Dolan* "might not" apply to monetary exactions. In 2004 the Texas Supreme Court in *Flower Mound* (at 135 S.W.3d 636) was just as emphatic as the South Carolina Supreme Court about the effect of *Del Monte Dunes* but holding just the opposite concluding that a sum of money paid to fulfill an imposed development condition did fall within *Dolan's* reach. Which way is it? *Del Monte Dunes* only begs the question.

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[6] (...continued)
argument is the correct one is a matter for briefing and does not detract from the significance of the nationwide dispute on this point. The Town's position highlights this important question.

ii. States Holding That Exactions of Money Are Subject to *Dolan's* Heightened Scrutiny Analysis.

Other high courts have specifically applied *Dolan's* heightened scrutiny to compelled fees. California is in the forefront on this issue. See *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 874, 911 P.2d 429, 442-443 (1996), cert. denied 519 U.S. 929 (1996) dealing with fees tailored to specific situations. *Ehrlich* has received great notoriety in academia and among the lower courts of the nation and has become somewhat of a hallmark in this regard. Ohio (*Home Builders Assn. of Dayton and the Miami Valley v. City of Beavercreek*, 89 Ohio St.3d 121, 127, 729 N.E.2d 349, 355 (2000)), Texas (*Town of Flower Mound v. Stafford Estates Limited Partnership,* supra, at 135 S.W.3d 635-641) and Illinois (*Northern Illinois Home Builders Association, Inc. v. County of DuPage,* 165 Ill.2d 25, 32, 649 N.E.2d 384, 388-389 (1995)) follow suit. With regard to limited compelled payments tailored to ameliorate site specific conditions, similar in nature to those in *Erlich,* so too does Oregon (*Dudek v. Umatilla County*, supra at 187 Or. App. 514-515, 69 P.3d 757-758 (2003)). Both *Dudek* and *Flower Mound* discuss this dispute at length and chronicle the national disarray on the topic.

iii. States Holding that Generic Per Lot "In Lieu of" Dedication Fees Are Subject to *Dolan*'s Heightened Scrutiny

Some state high courts have held that *Dolan's* heightened scrutiny analysis applies to generic "one size fits all" per lot in lieu of dedication fees, i.e. uniform fees keyed only to the number of units or lots with no consideration for the actual recreational impacts generated by that particular development. See *Twin Lakes Development Corp v. Town of Monroe,* 1 N.Y.3d 98, 103-106, 801 N.E.2d 821, 825 (2003), cert. denied 541 U.S. 974 (2004) and *Smith v. Town of Mendon,* 4 N.Y.3d 1, 12, 822 N.E. 2d 1214, 1219 (2004). The arrangement at bar is such a generic per lot fee. This view contrasts with that of *Ehrlich, Dudeck* and *Flower Mound* applying *Dolan's* proportionality test to sums paid in order to mitigate specifically identified site impacts occasioned by the particular project under review.

Compounding the confusion is the court's ultimate holding in *Twin Lakes* (at 1 N.Y.3d 106, 801 N.E.2d 826). While finding *Dolan* applicable to such a generic per lot in lieu of fee, it avoided *Dolan's* mandate by relying on a presumption of constitutionality of the fee law and placed the burden of proving its disproportion on the developer despite *Dolan* admonition (at 512 U.S. 391, FN 8) to the contrary in the context of actual dedications.

The State of Washington holds just the opposite concluding that blanket per lot in lieu of fees made without any evaluation by the government of the direct impact of the development at hand are indefensible. See discussions in *Trimen Development Company v. King County*, supra at 124 Wash.2d 274-275, 877 P.2d 194 (1994) citing *Dolan*. The two views do not seem to be reconcilable.

iv. There is Confusion in the Federal Courts as to Whether Money In Any Form Is Property as Meant by the Takings Clause

The issue of whether money in any context is "property" within the meaning of the takings clause is not clear even in this Court. In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-546 (1998), a case involving a compelled payment to a retirement fund, Justice Kennedy, concurring in part and dissenting in part, argued at length, citing *Dolan* among other authorities, that an obligation to pay money was not property within the meaning of the takings clause. Justice Kennedy's remarks have attracted considerable attention in this debate with some observers feeling that they are definitive on the subject. Yet, in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Court employed a taking analysis to money in the form of earned interest in an attorney's trust fund that had been seized by the state for public purposes.

Some Courts of Appeals, also in a non land use context, hold that money alone can never be the subject of a wrongful taking. See e.g. *Kitt v. United States*, 277 F.3d 1330, 1336 (D.C. Cir., 2002). In sharp contrast the First Circuit had no qualms about employing a *Dolan* taking analysis to a substantial in lieu of fee of 1.7 million dollars. See *City of Portsmouth New Hampshire v. Schlesinger*, 57 F.3d 12, 17-18 (1st Cir., 1995).

C. *"Whither Thou Goest?"*[7]

Which way is it? Does *Dolan's* heightened scrutiny apply to fees at all? Does it apply to fees imposed by law? Does it apply only to dedications imposed by law? Does it apply to "in lieu of" dedication fees? Does money paid in lieu of land warrant Fifth Amendment protection? Was Justice Kennedy right in *Apfel*? There are no consistent answers to any of these questions across this nation. It is time that there were answers that land owners, developers and local governments can rely on.

Dolan, is a matter of federal law. It is wrong that it should lead to one result in one state and something else in another. The Court should rectify that unfortunate situation by deciding this case.

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[7] Acts of the Apostles, John, verse 16 ln. 5.

There is a compelling need for its guidance before this national confusion compounds itself even more in an ever growing area of importance.

Last term, in *Lingle v. Chevron U.S.A. Inc.*, - U.S. -, 125 S.Ct. 2074 (2005), the Court clarified the disarray that arose after its *Agins* decision and in so doing went out of its way (at 125 S.Ct. 2086-2087) to point out that *Dolan* was based on the doctrine of unconstitutional conditions. By deciding this case the Court can, and should, resolve, in similar fashion, the deep confusion among the states arising since it decided *Dolan*. By clarifying and giving content to what it meant by unconstitutional conditions in these circumstances the Court will create a well shaped body of federal takings jurisprudence on these topics that can be applied nationwide.

2. IT IS URGENT THAT THE COURT ANSWER AN IMPORTANT AND UNANSWERED QUESTION ABOUT THE APPLICATION OF *DOLAN'S* "INDIVIDUALIZED DETERMINATION" CALCULUS

Assuming that *Dolan*'s heightened scrutiny applies to in lieu of dedication fees, can government unilaterally shape the content of its proportionality calculus by excluding from its individual impact calculations (and resulting fee determination) available recreational elements that it does not want

its results to be measured against? That is just what this Town did in order to avoid *Dolan's* mandate. Does *Dolan* allow such skewing?

There are numerous municipalities in every state of the Union in which vast amounts of rich and ample recreational facilities are located, but which are not owned or maintained by the municipality imposing the in lieu of fee exemplified by state and county parks and public schools with their attendant facilities located in subordinate municipalities such as towns, boroughs or villages. The massive New York Adirondack Park Preserve encompassing 12 villages, 92 towns and 11 counties and millions of acres (about 3 million) of passive and active recreational lands owned and maintained by the State of New York in those municipalities comes to mind. On a more local scale, regional or local school facilities providing indoor swimming pools and basketball courts, open air playing fields, running tracks and the like, all available to the citizens of the school district, are a mainstay of the American scene.

Furthermore, almost every municipality in this nation has some sort of private recreational facility within its bounds, e.g. a privately owned golf course, tennis courts, or a gymnasium complex (now popularly known as a "sports center") with indoor pools, handball and racket ball courts and extensive

exercise facilities, available to the public on an admission fee basis.

Do not these type of public and private recreational facilities count for anything in *Dolan's* individual determination and proportionality calculus? Do not these facilities, as Justice Arabian said in the plurality decision in *Ehrlich* (at 12 Cal.4th 874, 911 P.2d 442), offer some "public value" in addition to the municipally owned facilities? Are only the municipally owned facilities to be recognized in a proportionality calculus? In large and small ways this issue seems to affect just about every local government in the country.

If there are facilities available within the municipality sufficient to absorb the recreational impacts of a proposed development regardless of who owns and maintains them or how they are geographically oriented, should a developer be held hostage to a preference or desire expressed by the municipality for a particular type of facility (e.g. "neighborhood") as opposed to another (e.g. "regional")?

While the Town's expressed preference for one type of recreational facility over another may be, as Justice Scalia said in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) at 841 a "good idea", does it follow that such a good idea must, of

necessity, be paid for by the developer? Or, in these kinds of circumstances, should all the taxpayers share in the burden of the preferred facilities?

This question is a very significant one. The approach this Town has taken, sanctioned by the New York courts, allows government to twist the content of the *Dolan* calculus to its own liking, thereby allowing it to escape *Dolan's* proportionality mandate and, at the same time, fashion an "out and out plan of extortion". *Nollan*, supra at 483 U.S. 837 (quoting *J.E.D. Associates, Inc. v. Town of Atkinson*, 121 N.H.581,584, 432 A.2d 12, 14-15 (1981)).

CONCLUSION

The deeply conflicting views surrounding the questions raised in this case are, in large measure, an extension of the sharp conflict of ideas expressed by the late Chief Justice in *Dolan's* FN 8 (at 512 U.S. 391) and the vigorous criticism of that view by Justice Stevens in his dissent (at 512 U.S. 411). Is the correct response to a perceived abuse by government of its power to impose these unique types of monetary obligations the traditional one of deference and presumed legitimacy, thereby relegating those dissatisfied to the ballot box for relief, or should the dissatisfied be allowed a judicial response using the Fifth Amendment as their tool in seeking relief? If so, do the protections of the

Amendment reach this type of situation at all? The time has come for the Court to answer these probing questions.

For the foregoing reasons the court should grant this petition.

Respectfully submitted,

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Max Wild
Of counsel

APPENDIX

NEW YORK COURT OF APPEALS

Long Clove, LLC,

Appellant,

v.

Town of Woodbury,

Respondent.

DECISION September 13, 2005

Mo. No. 948 SSD 40
Long Clove, LLC,
Appellant,
v.
Town of Woodbury,
Respondent.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

ROBERT W. SCHMIDT, J.P.
SONDRA MILLER
GABRIEL M. KRAUSSMAN
STEVEN W. FISHER, JJ.

2003-09273

LONG CLOVE, LLC, appellant, v.
TOWN OF WOODBURY, respondent.

(Index No. 8255/99)

James G. Sweeney, P.C., Goshen, NY, for appellant.

Christine K. Wienberg, New City, NY, for respondent.

In an action, inter alia, for a judgment declaring certain provisions of the Code of the Town of Woodbury unconstitutional as applied to the plaintiff, the plaintiff appeals from a judgment of the Supreme Court, Orange County (Owen, J.), entered April 20, 2004, which, inter alia, declared that the provisions were constitutional as applied to it.

ORDERED that the judgment is affirmed, with costs.

Contrary to the plaintiff's contention, the Supreme Court properly upheld the constitutionality of Local Law No. 2 of 1989 (Code of the Town of Woodbury § 139-28[C][6]) as applied to it (*see Dolan v. City of Tigard*, 512

US 374; *Twin Lakes Dev. Corp. v. Town of Monroe*, 1 NY3d 98, *cert denied* 541 US 974).

SCHMIDT, J.P., S. MILLER, KRAUSMAN and FISHER, JJ., concur.

May 31, 2005

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. JOSEPH G. OWEN, JSC

SUPREME COURT : ORANGE COUNTY

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LONG CLOVE, LLC,

Plaintiff,

- against -

TOWN OF WOODBURY,

Defendant.

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Plaintiff in this action seeks a judgment declaring the Town of Woodbury's prior Local Law No. 2 of 1989 (Code of the Town of Woodbury §139-28[C][6], which in June 1998 imposed upon plaintiff a Town Law §277 parkland fee of $1,500 per lot for a total fee of $123,000, unconstitutional as applied. Trial was held April 7, 2003.

Upon all the evidence adduced at trial, and all prior proceedings had herein, it is hereby decided that the complaint is dismissed.

Submit judgment to Orange County Clerk, as Clerk of the Court, with bill of costs.

FACTUAL BACKGROUND

Plaintiff Long Clove, LLC owns a clustered residential subdivision located in Woodbury, New York, consisting of 82 residential townhouse-fashion dwelling units and known as "Strawtown Farms Section 4B". This subdivision has a history dating back to 1981.

The Planning Board of the Town of Woodbury ("Planning Board") granted plaintiff's predecessors-in-interest final subdivision approval on July 14, 1981, conditioned upon further Planning Board and Town Engineer approval of the individual site plans for the dwelling units. No dedication of parkland was required at that time, nor was any Town Law §277 parkland fee then imposed. The parkland fee in 1981, if imposed, would have been $200 per approved lot.

A Master Plan was adopted by the Town Board of the Town of Woodbury ("Town Board") on March 3, 1988. Among other things, this Master Plan included:

> By most standards, the Town is well serviced by recreational land. There are some local deficiencies, however, particularly with regard to availability of ball fields and periodically with swimming facilities. A major concern, however, is that the Town-maintained park facilities are located primarily west of the Thruway. The easternmost portion of the Town, including the Valley Forge and Skyline Drive areas, where there is some steep acreage set aside for recreational use, are lacking in neighborhood type public recreational facilities.

(Master Plan: Town of Woodbury, Orange County, New York, adopted March 3, 1998 ["Master Plan"] [Plaintiff's Exhibit "1"], pp. 17-18).

On September 21, 1989 the Town Board adopted Local Law No. 2 of 1989, which increased the Town Law §277 parkland fee to $1,500 per approved lot, payable after final plat approval and prior to commencement of any on-site work.

Between September 1998 and April 1999, at the behest of the Town, an entity known as Tectonic Engineering Consultants PC of Central Valley, New York ("Tectonic Engineering"), prepared a study evaluating the Town's park system. After surveying the conditions of existing Town-owned park facilities and projected increases in population, Tectonic concluded in its April 1999 Recreation Study that (1) there was a short-term immediate need to improve and expand existing Town-owned park facilities at an estimated cost of $623,880; and (2) there was a long-term need for additional park land and capital improvements at an estimated cost of $5,720,250. These recommended measures included such things as a community recreational center, ball courts and the acquisition of 267 acres of "raw land" for future recreational purposes. To fund these measures, Tectonic Engineering recommended increasing parkland fee from $1,500 per approved lot to $5,300.

Prior to any action by the Town Board on this recommendation, and pursuant to then Local Law No. 2 of 1989, the Town of Woodbury Building Inspector ("Building Inspector") advised plaintiff's consulting engineers on June 21, 1999 that a parkland fee of $123,000 (82 lots x $1,500) was due prior to commencement of any work. Plaintiff purchased subdivision

property on July 27, 1999, and thereafter paid the required parkland fee. Upon payment, the Building Inspector issued permits for the dwelling structures above the foundations. Plaintiff commenced actual site preparation on or about August 15, 1999.

On September 18, 1999 the Town Board adopted Local Law No. 11 of 1999, increasing the parkland fee to $3,500 per approved lot. Plaintiff's subdivision was fully built out by December 30, 2000, and certificates of occupancy for all 82 dwelling units have been issued.

PROCEDURAL HISTORY

This action was commenced by filing on or about December 14, 1999. Thereafter, by motion returnable October 16, 2000, plaintiff sought an order granting summary judgment in its favor. In its December 20, 2000 short form order, the Court severed the parkland fee issue, and remitted the matter to the Planning Board of the Town of Woodbury for a needs analysis in accordance with Town Law §277(4) and *Matter of Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*, 76 NY2d 460. This determination was affirmed by the Appellate Division, Second Department by decision and order dated March 18, 2002.

In the meantime, following remittitur the Planning Board determined that plaintiff's subdivision was not susceptible to the actual dedication of land, but rather that the imposition of parkland fees was appropriate. Plaintiff thereafter renewed its summary judgment motion, arguing that the imposition of a uniform $1,500 per approved lot parkland fee violates the "rough proportionality" test set forth in *Dolan v. City of Tigard*, 512 US

374. This motion was denied by the Court's short form order dated July 2, 2002.

Trial was held on April 7, 2003, and the parties were thereafter permitted to submit post-trial memoranda of law.

LEGAL ANALYSIS

A. Plaintiff's Standing

Defendant Town of Woodbury argues, as a threshold issue, that plaintiff has no standing to challenge the 1989 Local Law No. 2 because it was not charged with a parklands fee until 1999. The Court disagrees.

"The right of a litigant to maintain an action for declaratory judgment declaring the invalidity of a zoning ordinance...is based on the same criteria required for institution of a proceeding under article 78 of the CPLR...." (*Blumberg v. City of Yonkers*, 21 AD2d 886, *affirmed* 15 NY2d 791, *reargument denied* 16 NY2d 834). In CPLR article 78 proceedings, a court's standing determination is guided by the three-part test set forth in *Dairylea Cooperative, Inc. V. Walkley*, 38 NY2d 6: (1) the petitioner must suffer a "injury in fact" from the challenged act; (2) the petitioner must be "arguably within the zone of interest" protected by the constitutional scheme in question; and (3) there can be no clear legislative intent to preclude review (*Id.* At 9-11; *see*, Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7802:5, at 295). Plaintiff's interest in the subject property, coupled with an allegation of specific, pecuniary damage, is sufficient to provide standing (*compare, Matter of Haber v. Bd. of Estimate of the City of New York*, 33 AD2d 571).

B. The Applicability of Dolan v. City of Tigard, 512 US 374

In essence, plaintiff argues that the two-part "rough proportionality" test set forth in *Dolan v. city of Tigard*, 512 US 374 controls the Court's determination with respect to the constitutionality of the parkland fees in issue. In opposition, defendant contends that as the Supreme Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions–land use decisions conditioning approval of development *on dedication of property to public use" (City of Montgomery v. Del Monte Dunes at Monterey, Ltd.*, 526 US 687, 702 [emphasis supplied]), "the present case is not one of an excessive exaction, and thus a less stringent standard should be applied" (Defendant's Post Trial Memorandum of Law, p.7). Defendant does not proffer any specific suggestions as to claimed applicable "less stringent standard".

In *Twin Lakes Development Corp. V. Town of Monroe*, 300 AD2d 573, *motion dismiss appeal denied* 99 NY2d 637, the Appellate Division, Second Department recently applied the *Dolan* "rough proportionality" test to a parkland fee issue nearly identical to the one at bar. The Court believes that it is presently bound by the *Twin Lakes* holding. In any event, as parkland fees are imposed in lieu of a dedication of land, there is precedent for applying the *Dolan* test in determining the constitutionality of such fees (*see, e.g., Trimen Development Co. v. King County*, 124 Wash.2d 261 [Supreme Court of Washington 1994]).

C. The Constitutionality of Local Law No. 2

The Supreme Court in *Dolan* set forth a two-part test governing exaction analyses:

> In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city [citing *Nollan v. California Coastal Comm'n*, 483 US 825, 837]. If we find that a nexus exists, we must the decide the required degree of connection between the exactions and the projected impact of the proposed development.

(*Dolan*, at 512 US at 386). As to the second part of this analysis, the Court deemed that the phrase "'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. *No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development*" (*Dolan*, 512 US at 391 [emphasis supplied]).

In its prior July 2, 2002 short form order, this Court held that the first part of the *Dolan* analysis, i.e. the existence of an "essential nexus" between a "legitimate state interest" and the imposed fee, had been met (July 2, 2002 Short Form Order, pp. 4-6). As set forth in that prior determination:

> The primary concerns addressed by Town Law §277, which authorizes the exaction of a park-land fee in lieu of an actual dedication of land, "are the present and anticipated future requirements of the town or broader community, not

> the subdivision alone" (*Matter of Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*, 76 NY2d 460, 469). This is a recognized state interest, and where a particular subdivision is found unsuitable to meet this interest by the actual dedication of land, "the planning board may require a sum of money in lieu thereof, in an amount to be established by the town board" (Town Law §277[4][c]).

(*Id.* At 4-5). The Court adheres to its original determination in this regard.

With respect to the second part of the *Dolan* analysis, i.e. the required degree of connection between the exaction and the projected impact of the proposed development, the Court held as follows:

> Accordingly, when measured against the "rough proportionality" standard, the Town of Woodbury's method of exacting fees must first consider the impact of the plaintiff's subdivision on the overall recreational requirements of the municipality. This requires both an assessment of the Town's "present and anticipated future requirements" as well as the particular subdivision's relation to this identified need.

(*Id.* At 6). The Town's method of imposing parkland fees in this particular instance satisfied these requirements.

Prior to the imposition of parkland fees on plaintiff in June of 1999, the Town commissioned Tectonic Engineering to conduct a study evaluating the park system with respect to existing demands and facilities, projected future demands and the measures necessary

to meet these future demands. This study, entitled the "Town of Woodbury Park System Master Plan Study", was promulgated in revised form in April 1999.[1] It was conducted for the express purposes of enabling the Town to predict the need for future improvements and expansion of the municipal park system.

In its study, Tectonic Engineering reported that the Town had 740 acres of land dedicated as Town parks and open spaces, consisting of community parks and natural resource areas. These facilities were utilized for both active recreation (e.g. physical sporting activities), and passive recreation (e.g. picnicking and enjoying open spaces), as well as special events. The study detailed the individual characteristics and amenities of each existing park, including the Schunemunk Park/Earl Reservoir; Central Valley Park; Brickly Field; and Peckman's Pond. After scrutinizing each park, Tectonic Engineering concluded that the current demand at each park exceeded available park facilities, and that certain short term as well as long term improvements were necessary to continue servicing the needs of the community and to comply with guidelines set by the Americans with Disabilities Act of 1992. Short term improvements recommended by the study ranged from the remodeling of rest room facilities to the relocation of a volley ball court and the upgrading of playground equipment, all at a cost of $623,880.

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[1] The fact that this study was commissioned subsequent to Local Law No. 2 of 1989 is immaterial. Plaintiff seeks to have the law declared unconstitutional *as applied*. Municipal planning, out of practical and legal necessity, is ongoing in nature. The study, in fact, provided the Town with a basis for charging parkland fees well in excess of those imposed upon plaintiff.

Tectonic Engineering also advised that given present population growth rates, the Town's parks would need to expand 30% by the year 2020, requiring certain long-term improvements in the form of additional and expanded facilities. In particular, the study noted a need for an indoor community/recreational center and the acquisition of 267 more acres of parkland, 40 acres of which should be "usable" parkland. These long-term improvements, according to the study, would cost $5,720,250. With respect to funding the improvements, Tectonic Engineering recommended as follows:

> According to our growth projections, the current population for the Town is approximately 9,883 and is projected to increase to 14,567 by the year 2020. Using an occupancy rate of 3.9 persons per household, this population growth translates into approximately 1,200 new dwelling units. If the new dwelling units were to support the entire capital expenses discussed above, the parkland fee would need to be increased to approximately $5,300 per unit, and this number does not include inflation of approximately 3% per year. This is significantly greater than the $1,500 per unit currently being assessed. . ..

(Town of Woodbury Park System Master Plan Study, Revised April 1999 [Plaintiff's Exhibit "2"], p. 21). In response to this study, on September 18, 1999 the Town Board adopted Local Law No. 11 of 1999, increasing the parkland fee to $3,500 per approved lot. Plaintiff, however, received the benefit of the $1,500 fee imposed under Local Law No. 2 of 1989.

The Court believes that the Tectonic Engineering study provides both an assessment of the Town's present and anticipated future requirements as well as the subject subdivision's relation to this identified need. This extensive study analyzed existing park facilities in a detailed fashion, as well as projected future facility and monetary needs based upon objective criteria. It also broke down these projected needs on a unit basis, thus permitting the Town to individually relate particular subdivisions to these needs.[2]

Under these *prima facie* circumstances[3], it becomes plaintiff's burden to prove that "the fee exceeds an amount roughly proportionate to the needs it is supposed to serve. . .[by offering sufficient] evidence to show that the Town in setting the parkland fee at $1,500 per lot, failed to analyze the impact of each new home in the Town and the Town's projected recreational need" (*Twin Lakes Development Corp. v. Town of Monroe, supra*, 300 AD2d at 547-575, *citing Dolan v. City of Tigard*, 512 US 374). Plaintiff fails to sustain this burden. The Tectonic Engineering study was, in fact, specifically designed to analyze the impact of each new home in the Town to projected recreational needs.

Plaintiff's primary arguments are predicated upon the testimony of its expert witness, landscape architect and urban planner Stephen Lopez, who criticized the Tectonic Engineering study in several respects. For

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[2] The court notes that the imposition of per lot parkland fees is not, *per se*, unconstitutional (*see, Twin Lakes Development Corp. v. Town of Monroe, supra*, 300 AD2d at 574-575 [upholding a parkland fee of $1,500 per lot]).

[3] *See, Dolan*, 512 US at 391, fn. 8.

example, the study was faulted for focusing primarily on Town-owned recreational facilities exclusive of other available parkland such as Harriman State Park. Mr. Lopez further questioned the Tectonic Engineering study's use of a 3.9 per household multiplier in projecting future population growth, rather than the more conservative 2.4 persons per household, and dismissed as a "guesstimate" the study's projection that 40 additional acres of usable parkland would be necessary. In Mr. Lopez's opinion, the existing recreational facilities available to the Town were sufficient to accommodate the recreational needs generated by the subject subdivision.

The fact that experts may disagree as to the scope of inquiry of a given study or the use of devices such as household multipliers cannot, by itself, devoid an otherwise constitutionally-enacted law of its protected status. Local Law No. 2 of 1989 carries a high presumption of constitutionality, and accordingly must be proven unconstitutional beyond a reasonable doubt (see *Lighthouse Shores v. Town of Islip*, 41 NY2d 7, 11-12). Plaintiff has the burden "of showing that 'no reasonable basis at all' existed for the challenged portions of the ordinance" (*Id.* At 12). Defendant's expert witness, municipal and land use planning consultant Stuart Turner, supported the Tectonic Engineering study's focus on usable Town-owned land which services the needs of the local municipality. In Mr. Turner's opinion, the inclusion of large tracts of State-owned property available to large groups of people outside of the municipality, as well as other in accessible or unusable "recreational" land, fails to take into account the individualized needs of the local communities. As far back as the March 3, 1988 Master Plan of the Town, a "major concern" was enunciated regarding the shortage of

"neighborhood type public recreational facilities" (Master Plan, pp. 17-18). It is certainly a credible expert opinion that the broad inclusion of generically-labeled "recreational parkland" in a planning analysis such as the one at bar would fail to properly address specifically-identified Town needs.

At best, plaintiff has produced an expert witness who disagrees with some of the underlying assumptions and conclusions of the Town's experts. This does not, however, render the Town's actions either unreasonable or unconstitutional.

This shall constitute the decision of this Court.

S/
Hon. Joseph G. Owen
Supreme Court Justice

Dated: September 26, 2003
Goshen, New York

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